STATE OF MICHIGAN

COURT OF APPEALS

DONNA B. DECOSTA,

Plaintiff-Appellant,

v

DAVID D. GOSSAGE, D.O., and GOSSAGE EYE CENTER,

Defendants-Appellees.

UNPUBLISHED
September 2, 2008

No. 278665
Hillsdale Circuit Court
LC No. 06-000747-NM

Before: Cavanagh, P.J., and Jansen and Kelly, JJ.

JANSEN, J. (*dissenting*).

I respectfully dissent from the majority's determination that the trial court properly dismissed plaintiff's complaint.

MCL 600.2912b(2) provides:

> The notice of intent to file a claim required under subsection (1) *shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim.* Proof of the mailing constitutes prima facie evidence of compliance with this section. If no last known professional business or residential address can reasonably be ascertained, notice may be mailed to the health facility where the care that is the basis for the claim was rendered. [Emphasis added.]

In the instant case, plaintiff's claim accrued on June 3, 2004. Plaintiff sent her initial notice of intent to "46 S. Howell Rd." in Hillsdale on June 1, 2006. Thus, because plaintiff sent her initial notice of intent before the period of limitations had expired,[1] the initial notice would have tolled the running of the period of limitations under ordinary circumstances. MCL 600.5856(c); see also *Waltz v Wyse*, 469 Mich 642, 649-650; 677 NW2d 813 (2004). Specifically, presuming the initial notice of intent was otherwise sufficient, the running of the period of limitations would have been tolled for 182 days from the date of the initial notice.

[1] The period of limitations for medical-malpractice actions is two years. MCL 600.5808(6).

MCL 600.2912b(1); see also *Potter v Murry*, 278 Mich App 279, 281-282; 748 NW2d 599 (2008).

The trial court determined that plaintiff's initial notice of intent was deficient because plaintiff had not sent it to defendants' "last known . . . address" within the meaning of MCL 600.2912b(2). Therefore, the court determined that the deficient notice did not toll the running of the period of limitations, see *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 64; 642 NW2d 663 (2002), and dismissed plaintiff's complaint on statute-of-limitations grounds.

As noted above, the language of 600.2912b(2) requires that the notice of intent "shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim." I fully acknowledge that this Court has held that "[t]he Legislature's use of the word 'shall' in subsection 2912b(2) makes mandatory the requirement that the notice be mailed in accordance with its provisions." *Fournier v Mercy Community Health Care System*, 254 Mich App 461, 468; 657 NW2d 550 (2002). I also acknowledge that defendants in the instant case had moved to a new address before the mailing of plaintiff's initial notice of intent and that plaintiff was aware of defendants' new address. However, I perceive no evidence to suggest that plaintiff was aware that the new address was defendants' *sole* or *exclusive* address. The language of 600.2912b(2) simply does not take into account the fact that some, if not many, health care professionals maintain more than one professional address at any given time. Indeed, it is eminently reasonable to conclude that plaintiff honestly believed that defendants simultaneously maintained two addresses—the previous address and the new address—both of which were "known" to plaintiff. Despite the fact that plaintiff had seen defendants at the new address, I cannot conclude on the facts of this case that plaintiff did not send her initial notice of intent to defendants' "last known . . . address."

Furthermore, I find the facts of this case distinguishable from the facts of *Fournier*, *supra*. In *Fournier*, the plaintiff enclosed the notices of intent for all six of the named defendants in one envelope and inadvertently sent that envelope to the residential address of an uninvolved, non-party physician. *Fournier*, *supra* at 463. None of the named defendants shared the non-party physician's address. *Id.* at 463-464. In contrast, plaintiff in the instant case did not send her initial notice of intent to an unrelated address, but rather sent it to a valid, known address where she had previously sought treatment from defendants. Because the facts of this case are distinguishable from those of *Fournier*, I conclude that *Fournier* should not control the outcome of the present appeal.

Lastly, I cannot omit mention of the fact that defendants actually received plaintiff's initial notice of intent, which was forwarded from defendants' previous address to their new address. MCL 600.2301 directs that "[t]he court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties." In light of the fact that defendants actually received plaintiff's initial notice of intent, I must conclude that plaintiff's act of mailing the notice to defendants' previous address "d[id] not affect the substantial rights of the parties." MCL 600.2301. Because they actually received the forwarded notice of intent, defendants were not prejudiced by the fact that plaintiff happened to send the notice to their previous address. I would reverse and remand for reinstatement of plaintiff's complaint.

/s/ Kathleen Jansen